92-1885

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STATE OF ALASKA,

Petitioner,

v.

UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; NATIONAL PARKS AND CONSERVATION ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SIERRA CLUB; THE WILDERNESS SOCIETY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Alaska has standing to bring suit on behalf of its citizens against the National Park Service, where the Park Service adopted regulations that violated rights granted to Alaskans under the Alaska National Interest Lands Conservation Act.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner State of Alaska respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on December 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix to this petition, App. A, *infra*, 1a.

The opinion of the United States District Court for the District of Alaska (von der Heydt, D.J.) has not been reported. It is reprinted in the appendix to this petition, App. C, *infra*, 8a.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was filed on December 7, 1992. An order denying a timely petition for rehearing (App. D, *infra*, 44a) was filed on February 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. Article III, § 2 of the Constitution provides in pertinent part:

> The judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and . . . to controversies to which the United States shall be a party. . . .

2. The Administrative Procedure Act, 5 U.S.C.A. § 706 (1977), provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law

3. Section 810(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C.A. § 3120(a) (1985), provides:

> In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence

purposes. No such withdrawal, reservation, lease, permit or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency –

> (1) gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;
>
> (2) gives notice of, and holds, a hearing in the vicinity of the area involved; and
>
> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

STATEMENT OF THE CASE

1. In 1980, Congress enacted the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 16 U.S.C.A. §§ 3101-3233 (1985 & Supp. 1991) (ANILCA). The Act expanded the federal conservation lands system, including refuges, parks, forests, and wilderness areas throughout the State of Alaska. The Act was a significant step in settling complex questions about the ownership and management of public lands in Alaska.

Title VIII of ANILCA addresses subsistence management and use on federal public lands.[1] Congress invoked "its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents . . . . " ANILCA § 801(4), 16 U.S.C.A. § 3111(4) (1985). The purpose of Title VIII "is to provide the opportunity for rural residents engaged in a subsistence way of life to [continue to] do so . . . . " ANILCA § 802(1), 16 U.S.C.A. § 3112(1) (1985).

Congress recognized that a significant aspect of the subsistence way of life involved use of cabins in remote areas of Alaska, including cabins built on federal lands. *See* S.R. Rep. No. 96-413, 96th Cong., 1st Sess. 30405, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070.[2]

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[1] ANILCA defines "subsistence uses" as:

> the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (1985).

[2] Park Service personnel also recognized the importance of these cabins for subsistence purposes. For example, in a memorandum to the superintendent of the Yukon-Charley Rivers National Preserve, the Subsistence Coordinator said:

> Yukon-Charley Rivers National Preserve has a long history of intense human use and occupancy which continues into the present day. The construction and

Many of these cabins were built long before the complex disputes over land ownership in Alaska were settled. The families who use these cabins wish to pursue traditional subsistence lifestyles. Other cabins on federal lands, of more recent origin, are not used as part of a subsistence lifestyle, but rather for recreation or commercial purposes.

In section 1303 of ANILCA, Congress sought to protect the frontier lifestyle of subsistence cabin users, while eliminating the recreational and commercial cabins that had recently been built on park lands. ANILCA required gradual removal of most nonsubsistence cabins from National Park System lands through issuance of "nontransferable, nonrenewable" one-year permits. ANILCA § 1303(a), 16 U.S.C.A. § 3193(a) (1985). On the other hand, Congress allowed subsistence uses of cabins and other structures to continue by requiring the Secretary to issue renewable, nontransferable permits for cabins built before December 18, 1973. *Id.* In addition, the Secretary was given discretion to issue permits for building new cabins, as well as for cabins built after December 18, 1973, where "necessary to reasonably accommodate subsistence uses . . . . " ANILCA § 1303(a)(4), 16 U.S.C.A. § 3193(a)(4) (1985).

Congress further directed the Secretary to manage federal lands in Alaska in a manner that will "cause the

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> use of log cabins by subsistence users has been an integral part of this pattern. The management of cabins and their use will in large measure determine the success of subsistence management in the park.

[AR 93]

least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands . . . . " 16 U.S.C.A. § 3112(1) (1985). Whenever an agency considers action affecting the public lands in Alaska, section 810(a) of ANILCA requires the agency to evaluate the impacts of its action on subsistence, and consider alternatives that would minimize such impacts. 16 U.S.C.A. § 3120(a) (1985).

2. On April 3, 1984, the Park Service published draft regulations, to be codified at 36 C.F.R. § 13.17, concerning use of cabins and other structures in various park areas in Alaska, including use of cabins and other structures for subsistence purposes. 49 Fed. Reg. 13160-13174. The State provided comments on these regulations, criticizing them in part on the ground that the Park Service failed to evaluate their impact on subsistence uses as required by ANILCA. Moreover, the State viewed the regulations as unnecessarily burdensome and complex. Because of this complexity, the people who lived in these remote wilderness areas – people who by their lifestyle had demonstrated their desire to avoid governmental bureaucracy – would not be able to comply with the regulations. The inevitable result would be that few, if any, subsistence cabins would remain on park lands, contrary to Congress's clear intent.

The period for public comment on the regulations ended January 10, 1985. [AR 818] One year and five months later, the Park Service made public an "ANILCA section 810 Evaluation and Finding for Proposed Cabin Regulations." [AR 743] The Evaluation incorporated by reference two documents. The first was a 28-volume environmental impact statement prepared approximately

twelve years earlier by the U.S. Department of the Interior and the U.S. Department of Agriculture for the proposed National Interest Lands ("1974 EIS"). The second incorporated document was a preliminary report on subsistence activities in the proposed Alaskan park lands, prepared nine years earlier (1977 Preliminary Report). [AR 746] The Evaluation did not discuss the relevance of either the 1974 EIS or the 1977 Preliminary Report; neither appears in the administrative record or discusses use of cabins or other structures on park lands for subsistence.

3. The final regulations were adopted by the Park Service on September 19, 1986, *see* 51 Fed. Reg. 33474-33488, without any response to the State's public comments or the draft regulations of the Alaska Land Use Council.[3] The State of Alaska subsequently filed suit as *parens patriae*, on behalf of its citizens, alleging that the National Park Service failed to follow "procedures required by law," in violation of 5 U.S.C. § 706(2)(D), and acted arbitrarily and capriciously, in violation of 5 U.S.C. § 706(2)(A), when it decided under section 810 of

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[3] Section 1201(i)(2)(A)(i) of ANILCA, 16 U.S.C.A. § 3181(i)(2)(A)(i) (1985), required the Alaska Land Use Council (ALUC) to make recommendations to the Park Service and other agencies regarding proposed regulations under ANILCA. On March 1, 1985, ALUC made recommendations on the regulations at issue here. [AR 651-665] The State was in substantial agreement with these recommendations. Under Section 1201(k), 16 U.S.C.A. § 3181(k) (1985), the Park Service had to respond to ALUC within 30 days. The Park Service did not respond until June 17, 1988 [CR 28 (Brief of the State of Alaska, Exhibits A and B)], more than one and one-half years after the adoption of its final regulations, and approximately one year after the State brought suit to challenge the regulations. [CR 1]

ANILCA that its actions would not significantly restrict the subsistence rights of Alaska's citizens.[4]

Alaska alleged the Park Service's failure to adhere to the requirements of ANILCA threatened the existence of a unique aspect of the subsistence lifestyle that ANILCA specifically sought to protect. Various environmental groups intervened as plaintiffs to challenge specific portions of the regulations, but their legal arguments were largely antithetical to those of the State. [CR 3; ER 1] The United States asserted as an affirmative defense that Alaska lacked standing as *parens patriae* to sue the federal government. [CR 18 at 3]

The claims of the State and intervening plaintiffs, and the defenses of the United States, were presented to the district court on cross-motions for summary judgment. On September 17, 1991, the district court held that the State had standing as *parens patriae* to challenge the National Park Service's cabin regulations. It found that those regulations affected the health and welfare of Alaska's citizens, and that the impact of those regulations presented the type of injury "the State, if it could, would likely attempt to address through its sovereign lawmaking powers." App. C, *infra*, 13a-14a (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). The regulations therefore affected Alaska's quasi-sovereign interests, interests a State has standing to protect under the *parens patriae* doctrine. *Id.* (citing *Snapp*,

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[4] Jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1361. [CR 1, 8; ER 2]

458 U.S. at 607). Accordingly, the district court found that this case was properly before it. *Id.*

On consideration of the merits, however, the district court granted the Park Service's motion for summary judgment on Alaska's challenges to the regulations, granted in part and denied in part the relief requested by the intervenors, and entered judgment otherwise substantially in favor of the United States. App. C, *infra*, 17a-42a. All parties appealed.

In its cross-appeal, the United States did not challenge the district court's conclusion that Alaska had adequately articulated a quasi-sovereign interest under the holding of *Snapp*. Instead, it argued only that no quasi-sovereign interest is sufficient when the defendant is the United States and the issue is one of federal law. On December 7, 1992, the court of appeals reversed the district court on the ground that Alaska lacked standing as *parens patriae*. App. A, *infra*, 5a. The court acknowledged that in the past it had "recognized *parens patriae* standing under these circumstances . . . . " App. A, *infra*, 3a. However, it found that a recent Ninth Circuit decision, which relied upon a footnote in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982), which in turn relied upon *Massachusetts v. Mellon*, 262 U.S. 447 (1923), established a bar to *parens patriae* suits against the federal government. The court felt bound by that precedent, "[r]egardless of any purported ambiguity in Supreme Court law . . . . " App. A, *infra*, 3a. On February 25, 1993, the Ninth Circuit denied Alaska's Motion For Rehearing With Suggestion For Rehearing En Banc. App. D, *infra*, 44a.

REASONS FOR GRANTING THE WRIT

The State of Alaska has been precluded from asserting, as *parens patriae*, the rights of its citizens against the federal government on the basis of a holding of *Massachusetts v. Mellon*, 262 U.S. 447 (1923). This holding, although repeated uncritically as dictum in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n. 16 (1982), is in fact inconsistent with the ultimate holding of *Snapp*. Other decisions of this Court also undercut the *Mellon* rule. In addition, the rule has been the object of criticism by legal commentators and the source of confusion in the lower courts. *Mellon's* apparent bar on *parens patriae* standing therefore is ripe for reconsideration.

1. In *Mellon*, Massachusetts invoked the original jurisdiction of the Supreme Court to challenge the constitutionality of the Maternity Act of 1921. The Act appropriated funds to the various States – that chose to accept its terms – for the purposes of reducing infant mortality and protecting the health of mothers and infants. Massachusetts alleged that the Act was unconstitutional because these purposes were local rather than national, and that by requiring it to comply with the Act or forgo its share of the appropriated funds the federal government had infringed upon the rights of its citizens. *Mellon*, 262 U.S. at 479. This Court held that Massachusetts could not, as *parens patriae*, attempt to exclude its citizens from the operation of federal laws:

> [T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United

> States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois, 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government. In that field it is the United States, and not the state, which represents them as parens patriae . . . .

Mellon, 262 U.S. at 485-86.

a. This holding of *Mellon*, when applied to preclude a State from asserting the federal rights of its citizens against the United States, is at odds with this Court's rationale in *Snapp*, which held that States generally have standing to protect rights granted their citizens by Congress:

> [F]ederal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents. . . . [A] State does have an interest, independent of the benefits that might accrue for any particular individual, in assuring that the benefits of the federal system are not denied to its general population.

Snapp, 458 U.S. at 608. There is "no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens." *Snapp*, 458 U.S. at 611 (Brennan, J., concurring). "At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." *Id.* (emphasis in original) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (in suit challenging decision of the Secretary of the Interior, standing of

environmental organization requires allegation that it or its members were adversely affected by proposed action); *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963) (per curiam) (associations had standing to challenge Interstate Commerce Commission order where they represented individual carriers who allegedly would be adversely affected)).

Given that States have a legitimate interest in protecting the federal rights of their citizens, *Snapp*, 458 U.S. at 608, such interests should not become illegitimate when the federal rights at issue are being violated by the employees of a federal agency. Moreover, rendering these interests illegitimate is anomalous where, as here, Congress has waived the United States' sovereign immunity for such claims. *See* 5 U.S.C.A. § 702 (1977) ("An action in a court of the United States . . . stating a claim that an agency or an officer or employee thereof acted or failed to act . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States"). Moreover, a per se rule that denies States standing under such circumstances elevates the right of clubs and associations to protect their members above the right of States to protect their citizens.

b. Several decisions by this Court, in addition to *Snapp*, undercut the holding of *Mellon*. On at least two occasions since *Mellon*, this Court has decided cases brought by States asserting *parens patriae* standing. In *New York v. United States*, 331 U.S. 284 (1947), New York and other States had filed suit in district court asserting that certain freight rates approved by the Interstate Commerce Commission were outside the scope of the Commission's authority. In the district court, a three-judge

panel rejected the United States' contention that the plaintiff States did not have *parens patriae* standing. *New York v. United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946) (States have "standing to sue as parens patriae to preserve or enhance the welfare of their citizens by securing to them the proper administration of federal laws"). This Court affirmed without discussion of the standing question. 331 U.S. at 351. In *Phillips Petroleum v. Wisconsin*, 347 U.S. 672 (1953), the state of Wisconsin petitioned for review of a decision of the Federal Power Commission, alleging that the Commission had erroneously determined that Phillips Petroleum Company was not a natural-gas company under the jurisdiction of the Commission. Here, too, the plaintiff State had standing only insofar as it represented the interests of its citizens; yet this Court again determined the merits of the appeal without raising the question of standing. Thus, although neither *Phillips* nor *New York* discussed the question of *parens patriae* standing, both addressed important questions raised by States in their *parens patriae* capacity and both ignored the *Mellon* rule. These decisions undermine the continuing vitality of *Mellon* and support the conclusion that the cases brought by States acting in their *parens patriae* capacity are important and of a kind that this Court has an interest in hearing.[5]

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[5] The inconsistency in the Court's application of the *Mellon* rule has been noted by the Ninth and D.C. Circuits. *See Washington Util. & Transp. Comm'n v. Federal Communications Comm'n*, 513 P.2d 1142, 1152 n.13 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (citing *Phillips* and concluding "standing apparently based on *parens patriae*, though standing issue not discussed"); *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 677 (D.C. Cir.), *cert.*

Moreover, in *Massachusetts v. Laird*, 400 U.S. 886 (1970) (Douglas, J., dissenting), Justices Douglas, Harlan, and Stewart dissented from a denial of leave to file a bill of complaint in which Massachusetts sought to challenge, as *parens patriae*, the constitutionality of the Vietnam War. The dissenters thought that the question of standing should be addressed. In a published opinion, Justice Douglas argued that *Mellon* "did not announce a *per se* rule to bar all suits against the Federal Government as *parens patriae*, and a closer look at the bases of the opinion is necessary to determine the limits of its applicability." *Id.* at 888. Arguing by analogy to *Mellon's* companion case, *Frothingham v. Mellon*, 262 U.S. 447 (1923), whose ban on taxpayer standing had been substantially limited by *Flast v. Cohen*, 392 U.S. 83 (1942), Justice Douglas concluded that "*Mellon*, too, has been eroded by time." *Laird*, 400 U.S. at 889. Justice Douglas further recognized the inconsistency in allowing States access to federal courts as *parens patriae* in some cases, but denying them the right to vindicate harm of "no less a magnitude" in other cases. *Id.* Finally, another aspect of *Mellon* – the view that State challenges under the Tenth Amendment to congressional enactments are not justiciable, *Mellon*, 262 U.S. at 483 – no longer prevails. *See, e.g., New York v. United States*, 112 S. Ct. 2408 (1992) (addressing a State's Tenth Amendment challenges to provisions of Low-Level Radioactive Waste Policy Amendments of 1985).

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denied, 429 U.S. 977 (1976) (citing *New York* as "the only case in which the Supreme Court has upheld state *parens patriae* standing to sue the Federal Government").

2.a. The *Mellon* rule is at odds with the legal and policy bases for the *parens patriae* doctrine. This Court has relied upon an analogy to independent countries to explain the basis of *parens patriae* standing, and has established that a State as sovereign may sue another State to protect the health and well-being of its inhabitants. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them"). *See also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) ("the States by their union . . . did not renounce the possibility of making reasonable demands on the grounds of their still remaining quasi-sovereign interests"). This reasoning supports Alaska's standing to file suit to protect the health and welfare of its citizens when federal employees fail to comply with federal law.

In contrast to the well-developed policies in favor of *parens patriae* standing when States sue individuals or other States, the rationale for prohibiting *parens patriae* standing when States sue the federal government has never been fully articulated. The prohibition does not rest upon any explicit provision in the Constitution. The United States' defense of the rule rests almost entirely upon the ground that citizens of a State are also citizens of the United States, and it concludes from this that where federal law is involved, the United States is the primary *parens*. This, however, merely restates the rule while failing to address "[j]ust why it [is] appropriate to look to the federal government to protect the citizen from the federal government . . . . " David P. Currie, *Federal Courts* 65 (3rd ed. 1982). Indeed, "[t]he argument that the

federal government can be presumed to protect the interests of all citizens in relation to its own operations is not persuasive, in light of the regularity with which citizens prove the contrary in individual litigation." 13A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.11, at 25 (2d ed. 1984).

Moreover, "[a]lthough there is an understandable reluctance to increase the range of adversary confrontation between states and the federal government, the mere enforcement of federal statutory requirements against federal officials does not present a real threat to sound federalistic concerns." *Id. See also* Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. Pa. L. Rev. 1069 (1977) (the rule that a State may not stand as *parens patriae* between its citizens and the federal government has been outmoded by the changing balance of federalism, at least as to challenges to federal administrative action); Comment, *Federal Jurisdiction: State Parens Patriae Standing in Suits Against Federal Agencies*, 61 Minn. L. Rev. 691 (1977) (standing should be allowed whenever the State's claims pass muster under the established quasi-sovereign interest standard that applies when suit is not brought against United States); Case Note, 26 Cath. U.L. Rev. 168 (1976) (changes in the balance of the federal system warrant reexamination of the *parens patriae* rule); Strausberg, *The Standing of a State as Parens Patriae to Sue the Federal Government*, 35 Fed. Bar J. 1 (1976) (States should have standing to challenge the propriety of executive enforcement of federal statutes).

b. Alaska is not attempting to exclude its citizens from the operation of federal laws, nor is it attempting

"to protect its citizens against any form of enforcement of unconstitutional acts of Congress . . . . " *Mellon*, 262 U.S. at 485. Instead, it is attempting to secure for the benefit of its citizens federally created rights under an Act of Congress. These rights create interests that Alaska may seek to protect as *parens patriae*. *Snapp*, 458 U.S. at 608. Alaska's position in this respect is not distinguishable from that of Puerto Rico when it sought for its citizens the protection of federal anti-discrimination laws, *Snapp*, or that of Georgia when it sought for its citizens the protection of the federal antitrust laws, *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), or that of Maryland when it sought to secure for its citizens the benefits of the Natural Gas Act, *Maryland v. Louisiana*, 451 U.S. 725 (1981). *See Snapp*, 458 U.S. at 610.

ANILCA represents a unique attempt to address the special relationship the residents of Alaska have with the land and its natural resources. The people the Act seeks to protect do not, as a practical matter, have the ability to maintain a federal action to protect their interests. These Alaskans live in remote areas, far removed from mainstream society, often without electricity or running water and with little or no means of regular access to established communities. Many participate only sporadically, if at all, in this country's cash economy. As a result, the rights and benefits Congress sought to bestow under ANILCA will go unprotected if the State of Alaska is not allowed to assert them. Denying Alaska *parens patriae* standing will frustrate Congress's intent under ANILCA, and threaten genuine hardship to the citizens of the State who rely upon subsistence as a way of life.

3. The lack of a firm legal basis for the rule in *Mellon* has created confusion in the lower courts. Prior to *Snapp*, the Ninth Circuit had held *Mellon*'s rule on *parens patriae* standing did not apply where, as here, the State "relies upon [a] federal statute, and seeks to vindicate the Congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement." *Washington Util. and Transp. Comm'n v. F.C.C.*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *Washington Utilities* relied on the fact that "States or territories have been permitted to sue as *parens patriae* for review of federal regulatory agency decisions in many cases" subsequent to *Mellon*. *Washington Utilities*, 513 F.2d at 1152 n.13 (citing *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035 (1954), *aff'g Wisconsin v. Federal Power Comm'n*, 205 F.2d 706 (D.C. Cir. 1953) (standing apparently based on *parens patriae*, though standing issue not discussed); *Guam v. Federal Maritime Comm'n*, 117 U.S. App. D.C. 296, 329 F.2d 251, 252-53 & n.7 (1964); *California v. Federal Power Comm'n*, 296 F.2d 348 (1961), *rev'd on other grounds*, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962); *Puerto Rico v. Federal Maritime Bd.*, 110 U.S. App. D.C. 17, 288 F.2d 419 (1961); *Public Utilities Comm'n v. Federal Power Comm'n*, 205 F.2d 116, 119 (3d Cir. 1953) (assuming standing without deciding); *New York v. United States*, 65 F. Supp. 856, 872 (N.D.N.Y. 1946), *aff'd*, 331 U.S. 284, 67 S. Ct. 1207, 91 L. Ed. 1492 (1947)).

The *Snapp* footnote has not alleviated this confusion. For example, in *United States Dep't of Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538 (D.C. Cir. 1992), the D.C. Circuit held that Pennsylvania, the Pennsylvania

Fish Commission, West Virginia, and West Virginia's Department of Natural Resources had standing, as *parens patriae* under *Snapp*, to challenge a decision by the Federal Energy Regulatory Commission (FERC) to license various hydroelectric projects in the Ohio River basin. 952 F.2d at 544 n.4. The State agencies alleged, among other things, that FERC failed to give adequate weight to environmental considerations when it made its decision. 952 F.2d at 544. *See also Alaska v. United States Dep't of Transp.*, 868 F.2d, 443 n.1 (D.C. Cir. 1989) (*parens patriae* doctrine unsettled after *Snapp*); *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989) (although footnote 16 in *Snapp* is mere dictum, no need to address *parens patriae* issue until another day); *Texas v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992) (same). *Cf. Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) (accepting uncritically *Snapp*'s dictum), *cert. denied*, 111 S. Ct. 2052 (1991); *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882-83 (10th Cir. 1992) (same); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 354-55 (8th Cir. 1985), *cert. denied*, 478 U.S. 1012 (1986). This confusion will continue, to the detriment of the States and their citizens, until it is dispelled by this Court.

A reexamination of *Mellon* will not burden the federal courts with excessive litigation. No flood of litigation occurred in the Ninth Circuit after it adopted, in 1975, the approach Alaska advocates here. While the docket of the federal court system is a legitimate concern, that concern was equally present in *Snapp*, but was inadequate to override the States' interests in securing for their citizens federally created rights. Nor will overruling *Mellon* increase the number of cases this Court will hear under its original jurisdiction. *United States v. Nevada*, 412 U.S.

534, 538 (1973) (no need to take original jurisdiction where State has another adequate forum in which to settle claims).

CONCLUSION

The fundamental issue in any *parens patriae* action should be whether the State has adequately articulated a quasi-sovereign interest under *Snapp*. The lessons of *Snapp* are that such determinations are made on a case-by-case basis, and that States generally may assert the federal rights of their citizens. The holding of *Mellon*, which establishes a *per se* bar on *parens patriae* suits by States against the federal government, is inconsistent with *Snapp* and should be reexamined. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 1993

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA, Plaintiff-Appellant/ Cross-Appellee, v. UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; MANUEL R. LUJAN, in his official capacity as Secretary of the Interior, Defendants-Appellees/ Cross-Appellants, v. NATIONAL PARKS AND CONSERVATION ASSOCITATION, INC.; ALASKA CENTER FOR THE ENVIRONMENT; SIERRA CLUB, INC.; THE WILDERNESS SOCIETY, Plaintiff-Intervener-Appellants/ Cross-Appellees.	Nos. 91-36297 91-36299 91-36303 D.C. No. CV-87-00012-JAV Filed: 12/07/92 MEMORANDUM* * This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Appeal from the United States District Court

for the District of Alaska

James A. von der Heydt, Senior Judge, Presiding

Argued and Submitted Nov. 5, 1992

Seattle, Washington

Decided Dec. 7, 1992

Appeal from the United States District Court for the District of Alaska; Nos. 91-36297, 91-36299 and 91-36303,

D. Alaska

REMANDED FOR DISMISSAL.

Before: HUG, POOLE and FERGUSON, Circuit Judges.

The State of Alaska ("Alaska") appeals the district court's summary judgment order denying a challenge to a set of regulations promulgated by the National Park Service ("NPS") regarding the use and construction of "trespass cabins" on lands governed by the Alaska National Interest Lands Conservation Act ("ANILCA"). The National Parks and Conservation Association and other conservation groups (collectively "conservation groups"), which entered the litigation as plaintiff-interveners, appeal the district court's refusal to invalidate one of the regulations. NPS, meanwhile, cross-appeals the district court's invalidation of one regulation and challenges the standing of the plaintiff and plaintiff-interveners to maintain the action.

We conclude that neither Alaska nor the conservation groups established standing to sue NPS. We therefore do not reach the merits in any of these appeals.

I.

Alaska relied upon the doctrine of *parens patriae* to establish its standing to sue NPS in the district court. This doctrine will generally grant a state standing to sue where the state has demonstrated injury to a "quasi-sovereign" interest, apart from the interests of particular

private parties. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Such an interest may be in the physical or economic well-being of its residents or the protection of its rightful status in the federal system. *Id.* The district court was persuaded that Alaska had demonstrated an injury to such an interest because of NPS' regulations and held that Alaska had standing to maintain the suit.

We conclude that the district court's holding was in error because it granted a state *parens patriae* standing to sue an agency of the federal government. In *Snapp*, the Supreme Court clearly stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n. 16. Though at one time we recognized *parens patriae* standing under these circumstances, *see Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), we have since acknowledged that the view expressed by the Supreme Court in *Snapp* is controlling. *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990), *cert. denied*, ___U.S.___, 111 S. Ct. 2052 (1992).

Alaska attempts to minimize the court's statement in *Snapp* as mere dicta and argue that its case is distinguishable from an earlier Supreme Court case upon which the *Snapp* court relied, *Massachusetts v. Mellon*, 262 U.S. 447 (1923). These arguments are of little avail. Regardless of any purported ambiguity in Supreme Court law, *Burford* has established as Circuit law a bar on *parens patriae* suits against the federal government. We are now bound by that precedent.

Alaska also argues, for the first time on appeal, that it has standing to sue based upon 5 U.S.C. § 702 (1988) ("Administrative Procedure Act") and an implicit grant of standing in ANILCA itself. These arguments also must fail. "Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n. 24 (1982); *see also Sierra Club v. Morton*, 405 U.S. 727 (1972). Thus, without satisfying the constitutional requirements for standing, an asserted right to judicial review under either of these statutes will not, in and of itself, confer standing on Alaska.

II.

The conservation groups entered this litigation as plaintiff-interveners against NPS. Ordinarily, interveners need not satisfy the standing requirements of Article III in order to maintain their appeal. See *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989). However, "an intervener's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervener that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *cf. Yniquez v. Arizona*, 939 F.2d 727, 731 (9th Cir.1991) (intervener's right to maintain appeal where principal party has acquiesced in judgment is contingent on showing of Art. III standing).

Because we hold that plaintiff Alaska has no standing to maintain this suit, the conservation groups must demonstrate that they have standing to maintain the underlying action and the appeal. Though the they have asserted such standing, they have directed us to no evidence which supports their assertion. The conservation groups, therefore, have not demonstrated standing to bring this action.

III.

We conclude that neither Alaska nor the conservation groups have demonstrated standing to maintain this action. We therefore remand this case and direct the district court to dismiss it.

REMANDED FOR DISMISSAL.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-36297
CT/AG#: CV-87-00012-JAV

STATE OF ALASKA

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; DONALD HODEL, in his official capacity as secretary of the interior

Defendants - Appellees

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION; ALASKA CENTER FOR THE ENVIRONMENT; SIERRA CLUB, INC.; THE WILDERNESS SOCIETY

Plaintiff-Interveners

No. 91-36299
CT/AG#: CV-87-00012-JAV

STATE OF ALASKA

Plaintiff - Appellee

v.

ALASKA CENTER FOR THE ENVIRONMENT; SIERRA CLUB; THE WILDERNESS SOCIETY

Plaintiffs - Interveners - Appellees

v.

UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; DONALD HODEL, in his official capacity as secretary of the interior; NATIONAL PARKS AND CONSERVATION ASSOCIATION

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REMANDED for DISMISSAL. Costs taxed in the amount of$160.60 are in favor federal appellees: United States of America, National Park Service & Donald Hodel.

Filed and entered___12/7/92

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, v. NATIONAL PARKS AND CONSERVATION ASSOCIATION, ET AL., Intervener-Plaintiffs, v. UNITED STATES OF AMERICA, ET AL., Defendants.	)	Filed: 09/17/92 MEMORANDUM AND ORDER
VIGGO THOR BRANDT-ERICHSEN, Plaintiff, v. UNITED STATES DEPARTMENT OF INTERIOR, ET AL., Defendants. J87-012 Civil (Consolidated)	)	

I. INTRODUCTION.

THIS CAUSE comes before the court on motion to challenge regulations, filed July 15, 1988 (Docket No. 28), by plaintiff State of Alaska ("Alaska"); on motion for summary judgment, filed July 15, 1988 (Docket No. 29), by intervener-plaintiffs National Parks and Conservation

Association, et al. ("NPCA")[1]; and on motion for summary judgment, filed August 8, 1991 (Docket No. 53), by defendant, United States of America (hereinafter referred to as National Park Service, "NPS"). For the reasons stated below, the court denies Alaska's challenge to regulations, grants in part NPCA's motion for summary judgment, and grants NPS's motion for summary judgment.

II. BACKGROUND.

In 1980 Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA"), Public Law No. 96-487, 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.* Part of the Act greatly expanded the acreage of the national park system in Alaska. Within the acreage added were many "trespass cabins." These are cabins that were illegally constructed and occupied in what is now national park land. Codified at 16 U.S.C. § 3193, the Act made provisions for continued occupancy of cabins located on the land subsequently withdrawn for national park use. Based on when the initial occupancy occurred, the statute created three classes of trespass cabins.

The first class, cabins in existence prior to December 18, 1973, "may be occupied and used by the claimant to these structures pursuant to a renewable, nontransferable permit. Such use and occupancy shall be for terms of five years each. . . . " 16 U.S.C. § 3193(a)(1). Such occupancy was further conditioned on the following terms:

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[1] Reference to intervener-plaintiffs include National Parks and Conservation Association, Alaska Center for the Environment, Northern Alaska Environmental Center, Southeast Alaska Conservation Council, Sierra Club and The Wilderness Society.

Provided, That the claimant of the structure by application:

(A) Reasonably demonstrates by affidavit, bill of sale or other documentation, proof of possessory interest or right of occupancy in the cabin or structure;

(B) Submits a sketch or photograph of the cabin or structure and a map showing its geographic location;

(C) Agrees to vacate the cabin and to remove all personal property from the cabin or structure upon expiration of the permit; and

(D) Acknowledges in the permit that the applicant has no interest in the real property on which the cabin or structure is located.

16 U.S.C. § 3193(a)(1)(A)-(D).

The second class of cabins are those which "the occupancy . . . commenced between December 18, 1973, and December 1, 1978," and "may be used and occupied by the claimant to these structures pursuant to a nontransferable, nonrenewable permit. Such use and occupancy shall be for a maximum term of one year." This class of cabins was also subject to the same four conditions found in 16 U.S.C. § 3193(a)(1) as outlined above, and restated in 16 U.S.C. § 3193 (a)(2)(A)-(D). Further, the statute provided that for this class of cabins the "Secretary may, on a case by case basis, subject to reasonable regulations, extend such permit term beyond one year for such reasons as the Secretary deems equitable and just." 16 U.S.C. § 3193(a)(2).

The third class of cabins are those constructed after December 1, 1978 which "shall be used only for official government business." 16 U.S.C. § 3193(a)(3). The statute further provides that a permit "may [be] issue[d] . . . under such conditions as [the Secretary] may prescribe for the temporary use, occupancy, construction and maintenance of new cabins or other structures if he determines that the use is necessary to reasonably accommodate subsistence uses or is otherwise authorized by law." 16 U.S.C. § 3193(a)(4).

To implement certain provisions of the Act governing the cabins at issue in this case, NPS published interim final regulations on June 17, 1981 concerning the uses that would be permitted and the type of uses for which the cabins could be utilized in various park areas managed by NPS. 46 Fed. Reg. 31836 (1981). New rules were proposed by the Department of Interior and were published in the Federal Register April 3, 1984. 49 Fed. Reg. 13160 (1984). After soliciting public comment and holding public hearings, final regulations were promulgated on September 19, 1986. 51 Fed. Reg. 33474 (1986), *codified at* 36 C.F.R. Part 13.

On April 27, 1987 Alaska filed suit against NPS and the Secretary of Interior challenging the legality of the regulations. Alaska seeks declaratory and injunctive relief. Alaska alleges that NPS failed to comply with procedural requirements for adopting regulations objected to by Alaska and the Alaska Land Use Council ("ALUC"). Alaska also alleges the 1986 regulations improperly restricted cabin use and subsistence use in the national parks in violation of Congress' intent in ANILCA. Alaska further alleges the Secretary failed to

provide a proper evaluation of the effect the regulations will have on subsistence uses under § 810 of ANILCA. *See* State of Alaska Complaint (Docket No. 1).

On July 22, 1987 (Docket No. 3), NPCA sought to intervene to oppose Alaska's position with regard to the 1986 regulations and to make further challenges to the legality of several regulations. The Court granted the motion to intervene on December 17, 1987. NPCA challenges three sections of the regulations, arguing the regulations are contrary to Congress' intent in ANILCA. NPCA claims the regulations are unlawful because: (1) they extend occupancy privileges to three "old" national parks contrary to Congress' intent; (2) they extend occupancy to those who occupied cabins between 1973 and 1978 all the way through to 1999 contrary to Congress' directive; and (3) they allow permit renewals after 1986 for occupants who reside in cabins four months of the year.

III. DISCUSSION.

A. Standing

NPS asserts in its opposition to Alaska's brief that this court lacks jurisdiction over this action because Alaska lacks standing to bring this action. Alaska counters that this court has already addressed the standing issue and denied NPS's motion to dismiss on the basis of standing. *See* Memorandum and Order, filed July 29, 1987 (Docket No. 12) and Memorandum and Order, filed December 21, 1987 (Docket No. 16). Alaska further argues that because NPS did not seek reconsideration of those

Orders, NPS's argument is untimely pursuant to Local General Rule 5(J) and thus must be denied.

NPS subsequently filed August 19, 1991 (Docket No. 56) a notice of supplemental authority on the standing issue. The supplemental authority is a recent ninth circuit case, *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990), *cert. denied, sub nom., Nevada v. Jamison*, 114 L. Ed. 2d 458 (1991) (*Nevada*). NPS submits that, pursuant to the new authority, this court must conclude that Alaska lacks standing to bring its action.

In the case relied upon by NPS, Nevada was challenging the Bureau of Land Management's grant of right-of-way to the Department of Energy to conduct a site characterization study of a proposed nuclear waste repository. The appellate court affirmed the district court's dismissal of the action for failure of Nevada to show that it would suffer concrete and immediate injury and for lack of standing to challenge the grant. Nevada alleged that it had standing in its *parens patriae* capacity to bring suit against the federal government.

Relying on *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 102 S. Ct. 3260, 3265 (1982), the ninth circuit recognized in *Nevada* that a state, acting in a quasi-sovereign capacity, can bring suit against the federal government through a *parens patriae* action. The injury that must be alleged by the state must affect "a sufficiently substantial segment" of the state's population. *Snapp*, 458 U.S. at 607, 102 S. Ct. at 3269. "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the

state, if it could, would likely attempt to address through its sovereign lawmaking powers" (but not through "'private bills' "). *Id.* The Supreme Court in *Snapp* also stated that, in general, a state does not have *parens patriae* standing to bring an action against the federal government. *Id.* at 610 n. 16, 102 S. Ct. at 3270 n. 16.

This court, in its Memorandum and Order filed December 21, 1987, relied on the *Snapp* case to determine that Alaska had standing under the holding of *Snapp* to bring a *parens patriae* action. This court found strong evidence that the injury at issue is one the state would address, if it could, by means of general laws. The court, therefore, found that the state has a quasi-sovereign interest, which is required for standing, in the NPS cabin regulations.

The supplemental authority provided by NPS does not change the above outcome. This court has already determined that Alaska has a quasi-sovereign interest in the cabin regulations. The *Nevada* case does not limit that interest. Although the ninth circuit recognized in *Nevada* that its prior case, *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, *cert. denied*, 423 U.S. 836, 96 S. Ct. 62 (1975) must give way to the Supreme Court's clear statement in *Snapp*, this court directly relied on *Snapp* in its December 21, 1987 order. Because nothing in *Nevada* changes the reliance on *Snapp*, and in fact establishes this circuit's reliance on that case, this court's determination that Alaska has standing to bring a *parens patriae* action remains unchanged.

B. Standards Of Review

1. ADMINISTRATIVE PROCEDURE ACT

Judicial review is sought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. This review is limited to the administrative record. *Friends of Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986). The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971) stated that under 5 U.S.C. § 706(2) of the APA, a reviewing court would set aside an agency action or find it unlawful if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 414, 91 S. Ct. at 822. When applying the arbitrary and capricious standard, the court is to engage in a substantial inquiry but does not substitute its judgment for that of the agency. *Id.* at 415-16, 91 S. Ct. at 824.

An agency's interpretation of a statute which it administers is not binding on the court but is entitled to substantial deference. *Department of Education v. Bell*, 770 F.2d 1409, 1413 (9th Cir. 1977). A court's review of an agency's statutory construction is limited and deferential. *Washington State Dep't of Game v. Interstate Commerce Com.*, 829 F.2d 877 (9th Cir. 1987). However, courts are the "final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 2781, n.9 (1984).

The court must address two questions when reviewing administrative statutory construction. *Id.* First, the

court must determine whether Congress has directly addressed the question at issue. If the intent of Congress is clear, the second question need not be reached. If, however, the court determines that Congress has not addressed the issue, the question becomes whether the agency's interpretation is based on a permissible construction of the statute. *Id.* The agency's interpretation need not be the only one it could have adopted or even the one the court would have adopted. *Id.* at 843, n.11, 104 S. Ct. at 2782, n.11 (citations omitted). An interpretation need only be reasonable. *Id.* at 844, 104 S. Ct. at 2782. Moreover, "an initial agency interpretation is not carved in stone." *Id.* at 863-64, 104 S. Ct. at 2792. An agency must wisely consider, on a continuing basis, varying interpretations. *Id.* However, considerably less deference is due when an agency's interpretation conflicts with an earlier interpretation of a consistently held agency view. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S. Ct. 1207, 1221 (1987) (citations omitted).

2. SUMMARY JUDGMENT.

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R.Civ. P. 56(c). Judicial review of administrative proceedings does not generally involve decision on issues of fact. *Occidental Engineering Co. v. Immigration & Naturalization Service*, 753 F.2d 766, 769-70 (9th Cir. 1985); *See also, Overton Park*, 401 U.S. at 415, 91 S. Ct. at 823.

C. Alaska's and NPCA's Challenge to Regulations.

As noted above, Alaska filed a brief which challenges the validity of regulations passed by NPS regarding trespass cabins. Seeking declaratory and injunctive relief, Alaska maintains that: (1) NPS failed to comply with !procedural requirements for adopting regulations objected to by the state and ALUC; (2) the 1986 regulations improperly restricted cabin use and subsistence use in the national parks in violation of Congress' intent in ANILCA; and (3) the Secretary failed to provide a proper evaluation of the effect the regulations will have on subsistence uses under § 810 of ANILCA.

1. ADOPTION OF ALASKA LAND USE COUNCIL'S RECOMMENDATIONS.

Alaska contends that NPS violated 16 U.S.C. § 3181(k)[2] in that NPS failed to expressly reject the recommendations of ALUC and thus the statute should be interpreted to require the Secretary of Interior to accept the recommendations. NPS suggests that no dispute exists that ALUC proposed recommendations and that NPS failed to respond within the thirty days required by statute. NPS submits that a response is required only if recommendations are not accepted. Further, NPS argues that the ALUC recommendations were essentially

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[2] That statute reads:

> If any Federal or State agency does not accept a recommendation made by the [Alaska Land Use] Council . . . such agency, within thirty days of receipt of the recommendation, shall inform the Council, in writing, of its reason for such action.

adopted. NPS also urges that even if a violation of the statute exists, it is a technical violation remedied by a late response.

Recommendations were submitted by ALUC on November 24, 1984. A response by NPS was made June 17, 1988, a time well past the thirty days required by statute. The statute requires, however, that a response be given within thirty days if the agency does not accept a recommendation made by the ALUC. NPS submits that it essentially adopted all the ALUC recommendations and therefore no response was necessary. The court agrees with NPS. In addition, even if a violation exists, Alaska does not assert that the state was prejudiced or that such a violation renders the regulations invalid. The only action required of NPS by the statute is to provide a written response why certain recommendations were not accepted. NPS has taken that step. Thus, absent a showing of prejudice or a showing that a late response renders the regulations invalid, the error, if any, committed by NPS is harmless. Therefore, Alaska's argument that NPS violated 16 U.S.C. § 3181(k) must fail.

2. ALASKA'S PETITION PURSUANT TO 43 C.F.R. § 14.3.

Pursuant to 43 C.F.R. § 14.2,[3] Alaska exercised its right to petition to seek a change to the regulations

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[3] 43 C.F.R. § 14.2 provides:

> Under the Administrative Procedure Act, any person may petition for the issuance, amendment, or repeal of a rule (5 U.S.C. § 553 (e)). . . . It [the petition]

adopted by NPS found at 36 C.F.R. § 13.17. Alaska asserts the Secretary of Interior violated 43 C.F.R. § 14.3[4] by failing promptly to consider and act on Alaska's petition. Alaska argues the belated and litigation prompted response of NPS failed to cure the error committed. Alaska seeks an award of costs associated with the litigation necessary to force the Secretary to follow his own regulations.

NPS submits that Alaska's claim is now moot. NPS further asserts that no violation of the regulation occurred and that the court should not establish a presumption of time in which an agency must act. NPS also contends costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), are unavailable to Alaska but that Alaska could obtain an award of costs provided for in 28 U.S.C. § 1920.

The regulations at issue were promulgated on September 19, 1986. Alaska petitioned the Secretary of Interior to amend the regulations on October 17, 1986. Alaska filed a complaint April 27, 1987 in which it pleaded that the Secretary failed to act promptly as required under 43 C.F.R. § 14.3. An amended complaint was filed by Alaska July 13, 1987 in which Alaska, in ¶ 11, repeated the allegation that the Secretary failed to act promptly.

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will identify the rule requested to be repealed or provide the text to a proposed rule or amendment and include reasons in support of the petition.

[4] 43 C.F.R. § 14.3 provides:

> The petition will be given prompt consideration and the petitioner will be notified promptly of action taken.

The index to the administrative record filed with the court indicates the Secretary of Interior acknowledged receipt of the petition November 20, 1986 and referred the petition to NPS. Index to the Record at 6A, Document No. 74B. The administrative record also indicates a draft response was prepared by NPS November 25, 1986. A response denying Alaska's petition was dated June 15, 1988.

In this court's Memorandum and Order filed December 21, 1987, NPS's motion to dismiss ¶ 11 of the amended complaint was denied. The court stated that "Absent special circumstances, any delay exceeding six months is plainly a violation of § 14.3." *Alaska v. United States*, J87-012 Civ. (D. Alaska, December 21, 1987). The court also recognized that Alaska did not seek invalidation of the regulations but sought only to require the Department of Interior to consider and respond to the petition.

Alaska's claim that the Department of Interior violated 43 C.F.R. § 14.3 is moot. NPS has filed a response. Alaska suggests the belated response by NPS failed to cure the error committed. Alaska does not challenge, however, the merits of the decision to deny the petition for amendment of the regulations. Nor does Alaska suggest how the alleged error can be cured. Even if the court were to find a prompt response was not given by NPS, there appears no further remedy available to Alaska. Alaska seeks an award of costs of litigation incurred in forcing the Department of Interior to abide by its own regulations. An award of costs is not available to Alaska under the EAJA. Further, an award of costs under 28 U.S.C. § 1920 does not provide for an award of costs of

litigation as characterized by Alaska. Therefore, Alaska's argument that NPS failed promptly to respond to its petition pursuant to 43 C.F.R. § 14.3 must fail.

3. ANILCA SECTION 810 ANALYSIS

Alaska contends that NPS committed procedural error when it improperly prepared and submitted an ANILCA Section 810 subsistence analysis a year and a half after the last opportunity for public comment on the regulations had ended. Alaska also contends that even if opportunity for public comment had been available, the subsistence analysis is inadequate and not in conformity with the requirements of law. Alaska concludes the Section 810 subsistence analysis is arbitrary and capricious. NPS submits it timely completed the Section 810 subsistence analysis and that its compliance with Section 810(a) was adequate.

ANILCA § 810(a) requires federal agencies contemplating the "use, occupancy, or disposition of public lands" in Alaska to "evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." 16 U.S.C. § 3120(a). Section 810(a) further directs an agency to make a determination whether the action "would significantly restrict subsistence uses." *Id.* This determination is the first of two steps Congress intended in the statute. It is referred to as a "tier-I" evaluation. *Kunaknana v. Clark,*

742 F.2d 1145, 1150-51 (9th Cir. 1984). If the agency determines that the contemplated action may significantly restrict subsistence use, only then does the agency proceed to the second step of the process, known as a "tier-II" evaluation. *Id.* at 1151. The "tier-II" evaluation requires the agency to notify and hold hearings for the affected communities. *Id.* Therefore, the "tier-II" requirements of notification and hearing need not be implemented when an agency makes a finding of no significant restriction.

In regard to the proposed action at issue in the present case, NPS made a determination that the promulgation of regulations related to trespass cabins would not result in a significant restriction of subsistence uses. Administrative Record ("AR"), p. 749. NPS relied on the 1974 environmental impact statement for the proposed national interest lands and a 1977 "Preliminary Report: Subsistence Activities in Proposed Alaskan Parklands," by Richard K. Nelson, for a description of the specific subsistence environments. *Id.* at 746.[5] Upon a finding of no significant restriction, NPS satisfied the first procedural step required under § 810 (a). Based on a finding of no significant restriction in this case, the requirement to proceed with the second step under § 810(a), which requires notification and hearings procedures, need not

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[5] Included in the administrative record, AR at 415-451, is a determination that the proposed federal action of promulgating regulations related to trespass cabin use would not significantly affect the quality of human environment under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*, § 102(2)(c), and therefore an environmental impact statement was not required.

be implemented. Therefore, to the extent that Alaska argues that NPS failed to follow the notification and hearing requirements under "tier-II" of ANILCA § 810(a), that argument must fail.

Final comment on the draft regulations ended January 10, 1985. NPS completed a draft of the Section 810 analysis on June 16, 1986. The regulations were signed August 17, 1986. Alaska contends that it was improper to prepare and submit a Section 810 analysis almost a year and a half after the opportunity for public comment ended on the proposed regulations. Therefore, Alaska submits that NPS committed a procedural error in not providing the opportunity to comment on the Section 810 analysis during the comment period allowed for the draft regulations. NPS counters with the argument that the Section 810 evaluation simply assessed the regulation's impact on subsistence and did not serve as technical data upon which the regulations themselves were based.

Suppression of meaningful comment is similar to the rejection of comment altogether. *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). The purpose of rule-making procedures is to promulgate rules using adequate data. *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921, 94 S. Ct. 2628 (1974). The "provision for public comment can effectuate Congress's goals only if the public is able to make intelligent, informed, meaningful comments." *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981).

The subsistence evaluation was prepared to fulfill the procedural requirements contained in Section 810(a). A

finding of no significant restriction in the evaluation means that no public input is required. Therefore, the opportunity to comment on the subsistence evaluation was not suppressed; under Section 810(a) it was not required. Further, the Section 810 analysis does not contain specific data which was directly used in formulating the terms of the regulations. The evaluation assessed the impact of the regulations upon subsistence and did not serve as a data base for the promulgation of regulations on cabin use. Therefore, Alaska's argument must fail.

Alaska further submits the analysis was inadequate and does not contain information to support the conclusion that the proposed action will result in no significant impact. Alaska contends that the information relied upon by NPS to make its conclusion should have been updated. NPS argues the agency has simply promulgated regulations establishing a permit process which does not trigger the requirements of Section 810(a). NPS further maintains that if a subsistence evaluation was required, the court should apply a reasonable test in determining whether the evaluation in this case was adequate. Plaintiff-intervenors, hereinafter NPCA, make the same arguments as NPS.

Section 810(a) requires that when an agency is considering whether to "permit use [or] occupancy . . . of public lands," the agency "shall evaluate the effect[s] of such use [or] occupancy . . . on subsistence needs." 16 U.S.C. § 3120(a). Use or occupancy of trespass cabins was provided for in ANILCA. The agency was required to promulgate further regulations managing the use or occupancy regarding the trespass cabins. In *Sierra Club v. Penfold*, No. A86-083 Civ. (D. Alaska, Memorandum and

Order at 14-15, Jan. 29, 1987) the court determined that the Bureau of Land Management's processing of Notices did not trigger a requirement for federal action under NEPA, nor a requirement for a subsistence evaluation pursuant to § 810 of ANILCA.

Neither NPCA nor NPS points to an analogous notice process in this case similar to that found in *Penfold*. Reliance on *Penfold* is misplaced. The argument by NPS and NPCA that the only time a Section 810(a) analysis need be conducted is at the time of an individual permit application, therefore, must fail.

A reasonable test is applied to determine whether the evaluation in this case is adequate. *See Kunaknana v. Watt*, No. A83-337 Civ. (D. Alaska, Decision of Record at 42, Dec. 20, 1983), *aff'd sub nom., Kunaknana v. Clark*, 742 F. 2d 1145 (9th Cir. 1984). Alaska has not shown how more up-to-date information than relied upon to make the subsistence evaluation would support a significantly different evaluation outcome. The court is not to substitute its judgment for that of an agency. *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416, 91 S. Ct. at 824. The subsistence evaluation made in this case was based on reliable information and was reasonable. It evaluated the effect of the regulations on "subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use occupancy, or disposition of public lands needed for subsistence purposes." 16 U.S.C. § 3120(a). Therefore, Alaska's argument regarding the Section 810 analysis must fail.

4. RESIDENCY REQUIREMENT.

Alaska contends that NPS exceeded its statutory authority by adding the requirement established in 36 C.F.R. § 13.17(c). Alaska asserts the conditions listed in Sections 1303(a)(1) and (2), 16 U.S.C. § 3193(a)(1) and (2), describe the only conditions a claimant must fulfill to be granted a permit for use and occupancy of a trespass cabin, and that the requirements in the regulations related to "claimant" and "substantial portion of time" are additional requirements which were beyond the scope of NPS's authority to enact.

The definition of " 'claimant' means a person who has occupied and used a cabin or other structure as a primary, permanent residence for a substantial portion of time, and who, when absent, has the intention of returning to it as his/her primary, permanent residence." 36 C.F.R. § 13.17(c). The section also defines "substantial portion of time" to mean residency "at least 50 percent of the time since beginning occupancy and at least 4 (four) consecutive months of continuous occupancy in every calendar year after 1986." *Id.*

NPCA argues the regulation definition of "substantial portion of time" requires too short an annual residency requirement as a basis for continuing to qualify for an occupancy permit. NPCA concludes that a four-month-a-year approach is inadequate to ensure ANILCA's residence requirement for cabin permit use.

NPS submits, in response to Alaska's argument, the four provisions listed in Section 1303(a)(1) and (2) are discretionary, and thus the agency is not precluded from

imposing other reasonable conditions as a prerequisite for a cabin use permit. NPS asserts that NPCA's argument is whether a four-month-a-year occupancy is reasonable to establish residency, or whether the Secretary should have chosen a longer residency requirement. Reduced as such, NPS contends that NPCA has not shown the Secretary's choice unreasonable.

Sections 1303(a)(1) and (2), 16 U.S.C. § 3193(a)(1) and (2), establish four conditions a claimant must meet in order to receive a permit for use and occupancy of a trespass cabin. (See page 3 in which the four statutory provisions are set forth.) The above two statutory sections refer to conditions a "claimant" must meet in order to qualify for occupancy of a trespass cabin. The statute does not define "claimant." To implement the above statutory provisions, NPS promulgated regulations, part of which define "claimant." 36 C.F.R. § 13.17(c). That definition is set forth above. Part of the definition of "claimant" establishes that the claimant must reside as a permanent resident for a "substantial portion of time."

Whether Congress intended the agency to be limited to the four conditions listed in the statute or whether the statute allows the agency to enact additional conditions requires a review of the statutory construction. Alaska submits the doctrine of *expressio unius est exclusio alterius*[6] is applicable in this action. Because Congress identified very specific requirements that a claimant must fulfill in

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[6] The expression of one thing is the exclusion of another.

order to be eligible to continue cabin occupancy for residential purposes, Alaska argues that NPS had no authority to impose other conditions.

NPS examines the language of the statute and the use of the words "may" and "shall" as they are used throughout ANILCA. Generally, when the word "may" is used in a statute, discretionary action is allowed, and the word "shall" allows mandatory action. *United States v. Rodgers*, 461 U.S. 677, 706 (1983); *Edmonds v. United States Dept. of Labor*, 749 F.2d 1419, 1421 (9th Cir. 1984). In 16 U.S.C. § 3193(a)(1) and (2), the statute reads that cabins or structures "may be occupied and used by a claimant. . . ." NPS asserts that the use of the word "may" in the statute allows the agency to use its discretion to establish additional requirements which a claimant must meet beyond the four listed in the statute.

The use of the "may" in the statute elates to occupancy and use by a claimant of the cabin. The statute reads that cabins and structures "may be occupied and used by the claimant." 16 U.S.C. § 3193(a)(1) and (2). The word "claimant" was not defined in the statute. It was not unreasonable for NPS to define who qualifies as a "claimant." In making a determination of who may occupy and use a cabin, NPS determined that a claimant is one who permanently resides in the cabin. Recognizing that the trespass cabins were not used on a year around basis, NPS further qualified a claimant's occupancy and use of the cabin to be for a "substantial portion of time." NPS defined "substantial portion of time" to mean at least 50 percent of the time since beginning occupancy and at least four consecutive months of continuous occupancy in every calendar year after 1986. Not only was it

permissible for NPS to establish guidelines of who is a claimant and how long occupancy must occur, but the legislative history supports such an application. Alaska's argument that the four conditions listed in the statute represent exclusive conditions must fail. The doctrine relied upon by Alaska, while a recognized doctrine of statutory construction, should not be rigidly applied to defeat the purpose and intent of the statute.

Each of the three parties rely on identical language in the legislative history to support its view that Congress did or did not intend further conditions to be imposed by the agency. In allowing continued use of the trespass cabins, Congress wanted to "permit the continuation of this lifestyle wherever possible. . . . " *Senate Report* No. 96-413 at page 304. NPS claims that Congress did not want to disrupt the lives of those who were actually living on the land where the trespass cabins were located. NPS submits that the regulation meets this intent of Congress by requiring the claimant have resided on or continued to reside on the land for a substantial period of time.

NPCA does not dispute that primary residency at the cabin site is a prerequisite for qualifying for continuing renewals of occupancy permits. Instead, NPCA relies on the same legislative language to support its argument that Congress did not intend that a four month residency is sufficient to establish primary residency. Alaska uses the same language to argue that Congress intended to allow the continuation of the unique lifestyle whenever possible, and that by imposing the requirement established by NPS in the regulations, the legislative intent will be frustrated.

Congress clearly intended to provide for the continuation of the unique lifestyle of those occupying trespass cabins. To carry out that intent Congress enacted Section 1303(a)(1) and (2). The statute states in part that cabins "may be occupied and used by claimant" provided the claimant comply with the four conditions further stated in the statute. Language in the legislative history indicates that Congress intended that permits be granted to those who established continued residency in the cabins. In Senate Report No. 413 at 315 it is stated that:

> In some cases, the residents of Alaska have lived on these site [sic] of occupancy for a number of years but were unaware of the legal requirements of filing under the various land laws. The Committee intends that the Secretary utilize his permitting system to permit the continuation of this life style whenever possible.

The language suggests that Congress did not intend to extend permits to those who casually use cabins for recreational purposes. The language does suggest that Congress intended those residents who carry on a unique lifestyle be allowed to continue such use and occupancy. Therefore, the definitions established in the regulations by NPS are valid. NPS did not exceed its statutory authority in defining "claimant" and "substantial portion of time." Nor was the choice by NPS to require a minimum of four consecutive months residency unreasonable.

5. AUTHORITY TO ISSUE AND EXTEND PERMITS.

NPCA contends the authority of NPS to issue one year cabin occupancy permits under Section 1303(a)(2),

16 U.S.C. § 3193(a)(2), has expired. NPCA also maintains that NPS has no authority to extend expired permits. NPCA finally asserts that extension of permits until 1999 is unlawful.

NPS recognizes that the initial one year permitting authority pursuant to 16 U.S. C. § 3193(a)(2) has expired. The permitting authority includes the authority to issue permits and the authority to extend permits that have been issued. However, NPS submits that the Secretary has provided for possible extension of permits on a case by case basis. NPS further argues that the regulations do not grant the extension of all permits but leave that to a case by case determination. Finally, NPS submits that the regulations do not illegally extend expired permits.[7]

Congress established three classes of trespass cabins based on when occupancy commenced. At issue here are those cabins occupied between December 18, 1973 and December 1, 1978. Cabins occupied between those dates are subject to a permit system established in 16 U.S.C. § 3193(a)(2). The statute provides that a claimant whose use or occupancy commenced between the above dates may use such structure pursuant to a nontransferable, nonrenewable permit, and that such use and occupancy shall be for a maximum term of one year. The statute further provides that the Secretary may, on a case by case basis, subject to reasonable regulations, extend the permit term beyond one year for equitable and just reasons. Thus, the Secretary was given authority to issue permits

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[7] Alaska adopts NPS's argument on the issue presented in this section.

for a maximum period of one year and also to extend the permit term beyond one year for equitable and just reasons.

The statute became effective December 2, 1980. Interim regulations were adopted June 17, 1981 implementing the statute. The interim regulations allowed for additional time to issue one year permits, extending the time at the outside until the end of 1982. This date is determined by calculating a time one year from the date the statute was initially passed and then adding an additional year to allow for time for the enacted regulations to become effective. In regard to the extensions allowed, the interim regulations stated that permits may be extended "for a period not to exceed one year for such reasons as the Superintendent deems equitable and just." 46 Fed. Reg. 31836, 31858 (1981). In 1986, final regulations were adopted. The final regulations authorize the Superintendent to "issue and extend such permit for a term not to exceed December 1, 1999 for such reasons as are deemed by the Superintendent to be equitable and just." 36 C.F.R. § 13.17(e)(2)(ii). The regulations also provide a cut-off date of October 20, 1987, for which an applicant must apply for an initial one year permit.

There is agreement that Congress intended to eliminate cabins occupied between 1973-1978 from the national parks. *See* NPCA's Motion for Summary Judgment, pp. 17-19; NPS's Brief in Support of Cabin Regulations, p. 82. There is also agreement that the authority of NPS to issue one year cabin occupancy permits has expired. NPCA's Motion, pp. 20-22; NPS's Brief, pp. 83, 84. If NPS's permitting authority to issue and extend cabin occupancy permits has expired, the question

becomes when did that authority expire. Another question is whether the reasserted authority in the final regulations of NPS to allow the filing of an initial application for the issuance of a one year permit until October 20, 1987 was valid. Further, it must be determined whether NPS may grant extension of permits that are not expired, if any, through 1999.

The statute provides that the 1973-1978 cabins may be used and occupied pursuant to a nonrenewable, nontransferable permit, and that such occupancy shall be for a maximum period of one year. 16 U.S.C. § 3193(a)(2). NPS admits that its permitting authority has expired. It made that admission at the time the final regulations were published in the federal register at 51 Federal Register at 33476, 33481 on September 19, 1986. The interim regulations, published June 17, 1981 provided for an extension of the one year maximum period for the Secretary to issue a permit established in the statute. 46 Fed. Reg. 31836, 31845, 31858.

The authority to issue the one year permit expired sometime between June 17, 1981 when the interim regulations were published, and September 19, 1986 when the Secretary admitted that its authority to issue one year permits had expired. NPS submits that to fill this gap, the Secretary promulgated regulations which afforded a permit applicant to file an application no later than October 20, 1987. However, the authority to issue permits under the 1986 regulations contradicts the assertion by NPS that those same regulations provided only for the extension of a permit and not the issuance of a permit. NPS's Brief, pp. 84-85. It also contradicts the assertion by NPS that its authority to issue permits had expired.

The Secretary's authority to issue one year permits expired two years after the passage of ANILCA, or December 2, 1982. An applicant seeking a permit on the latest date NPS could have issued a one year permit, which was December 2, 1982, would have had a permit that expired one year later on December 2, 1983. As already noted, NPS admits its permitting authority expired sometime prior to the promulgation of the 1986 regulations. This permitting authority includes not only the issuance of permits but the extension of permits already granted. The 1981 regulations allowed an extension only for a maximum of a one year term. Because the Secretary's authority to extend permits also expired in December of 1982, any permit issued or extended as of that date would have expired by December, 1983. NPS had no authority after that date to issue or extend any permit. Thus, any permit issued or extended under the 1981 interim regulations would have expired prior to the date the final regulations were published in 1986.

Pursuant to the language of the statute, the Secretary has authority to extend the one year permit, subject to reasonable regulations. This authority is limited to the grant of extensions, and by the language of the regulations and NPS's admission, does not include the authority to issue new permits. NPS admits that its authority, under the 1986 final regulations, is limited to the grant of extensions of permits only and does not include the authority to issue new permits. NPS's Brief, pp. 84-85. The court agrees with this assertion by NPS. The final regulation allowing the "issuance" of a permit for a term not to exceed December 1, 1999 is invalid. The statute provided only for the issuance of a one year permit. The

final regulations allow for the issuance of a permit to exceed one year. This plainly contradicts the authority Congress granted in the statute. Further, the permitting authority of NPS to issue permits expired prior to 1986. The reassertion of authority by NPS to allow an applicant until October 20, 1987 to file for a one year permit pursuant to 36 C.F.R. § 13.17(e)(2)(iv) is invalid.

The statute provides that the "Secretary may, on a case by case basis, subject to reasonable regulations, extend such permit term beyond one year for such reasons as the Secretary deems equitable and just." 16 U.S.C. § 3193(a)(2). The 1981 interim regulations allowed the Superintendent to extend the permit issued for the 1973-1978 cabins "for a period not to exceed one year." 46 Fed. Reg. at 31845, 31858. In the 1986 final regulations, the Secretary provided that the "Superintendent may issue and extend such permit for a term not to exceed December 1, 1999 for such reasons as are deemed by the Superintendent to be equitable and just." 36 C.F.R. § 13.17(e)(2)(ii).

As noted above, and as admitted by NPS, no authority exists under the regulations for the issuance of a permit. Further, the Secretary has exceeded his authority under the statute by allowing an extension under the final regulations for a term not to exceed December 1, 1999. The 1986 interpretation given to the statute by NPS contradicts the interpretation given to the statute in 1981. Such an interpretation is given little deference. *Cardoza-Fonseca*, 480 U.S. at 446, 107 U.S. at 1221. Further, Congress intended that the class of trespass cabins occupied between 1973-1978 be eliminated. The extension of a permit until 1999 does not meet with Congressional intent

nor does it correspond with NPS's earlier interpretation of the statute. Therefore, NPS exceeded its authority in promulgating 36 C.F.R. § 13.17(e)(2)(ii), and as such the regulation is unlawful.

6. CABIN PERMITS IN ALASKA'S THREE OLD PARKS.

NPCA submits that Section 1303(a), 16 U.S.C. § 3193(a), does not apply to three parks administered by the park service. The three parks are Glacier Bay National Monument, Katmai National Monument and Mount McKinley National Park. NPCA reasons that because trespass cabins never were tolerated in the three parks, Section 1303(a) of ANILCA is inapposite to the cabins within the pre-ANILCA park areas. NPCA further argues that the plain language of the statute does not lead to the conclusion of NPS that Section 1303 applies to the three old parks especially in light of the fact that NPS had earlier held strong views that Section 1303 did not apply to the three old parks. Therefore, NPCA concludes that the regulation found at 36 C.F.R. § 13.17(b) applying Section 1303 to the three old park areas is invalid.

NPS contends that the plain language of the statute did not allow the three old parks to be excluded from application of the regulations.[8] NPS also asserts that because the park service did not know of any trespass

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[8] Alaska adopts the argument of NPS related to the issues in this section.

cabins within the three park areas, and because no permits requests were filed within the time allowed, the issue is moot.

A court must consider two questions when presented with an agency's construction of a statute. First, the court must look at whether Congress has addressed the question presented. *Chevron, U.S.A., Inc.*, 467 U.S. at 842, 104 S. Ct. at 2781. If Congress' intent is clear, the second question need not be reached. However, where the intent of Congress is not clear, the second question the court needs to address is whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843, 104 S. Ct. at 2782.

In the case before this court, the first question must be answered in the affirmative. Congress has directly addressed the question whether Section 1303 applies to the three old parks. The statute reads in part:

> On public lands within the boundaries of any unit of the National Park System created or enlarged by this Act. . . .

16 U.S.C. § 3193(a).

The statute applies to any public land within the boundaries of a park "enlarged" by the Act. The statute does not read that only the enlarged portion would be affected by the Act. Rather any unit that was enlarged would be covered by the Act. This would include not just the area added on to the existing park but it would include the entire park area. Therefore, Congress' intent is clear on the face of the statute. There is no need to reach the second question. Because the court finds that

the statute is clear on its face, the regulation found at 36 C.F.R. § 13.17(b) is not invalid.

7. 36 C.F.R. § 13.17(E)(7) AND ANILCA SECTION 1316.

Alaska asserts the provisions of 36 C.F.R. § 13.17(e)(7)[9] are in violation of Section 1316 of ANILCA, 16 U.S.C. § 3204.[10] Alaska contends the regulation is invalid because it permits the construction and use of temporary facilities only in national preserves, and not in national parks or national park system monuments.

NPS and NPCA submit the statute provides for the use and construction of temporary facilities only for the taking of fish *and* wildlife on public lands. Public lands in

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[9] The regulation states in part:

(i) In a national preserve where the taking of fish and wildlife is permitted, the construction, maintenance or use of a temporary campsite, tent platform, shelter or other temporary facility or equipment directly or necessarily related to such activities is prohibited except pursuant to the terms of a permit issued by the Superintendent. This requirement applies only to a temporary facility that will remain in place for a period longer than 14 days.

[10] The statute reads in part:

On all public lands where the taking of fish and wildlife is permitted in accordance with the provisions of the Act or other applicable State and Federal law the Secretary shall permit, subject to reasonable regulation . . . the establishment and use, of temporary campsites, tent platforms, shelters and other temporary facilities and equipment directly and necessarily related to such activities.

this instance are only national preserves, and do not include national parks and national monuments.

Subsistence fishing and taking of wildlife is allowed in national preserves. In 16 U.S.C. § 3202(c), Congress stated that "areas designated as national parks . . . shall be closed to the taking of fish *and* wildlife." (Emphasis added.) Some national parks and national monuments are open for subsistence use. However, because the taking of wildlife is allowed only in the national preserve and the language of the statute allows for temporary campsites in those areas where fish *and* wildlife are allowed to be taken, it is reasonable for the regulation to limit the permit to those uses on a national preserve. Thus, the limitation of 36 C.F.R. § 13.17(e)(7) tracks and implements the limitations created by the statute. Therefore, Alaska's assertion that the regulation is invalid is incorrect.

8. GUIDE USE OF WILDERNESS CABINS.

Alaska submits that NPS has exceeded its statutory authority in adopting 36 C.F.R. § 13.17(e)(6)(iii).[11] Alaska refers to a Senate Energy Committee Report to support its argument but does not cite what statutory authority NPS has exceeded in promulgating the regulation. Alaska contends that the regulation will frustrate the rights of

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[11] The regulation states in part:

(iii) A cabin or other structure located in a designated wilderness area may not be designated, assigned or used for commercial purposes, except that designated public use cabins may be used in conjunction with commercial guided visitor services, but not to the exclusion of the general public.

guides to continue to pursue their livelihood in the wilderness areas of Alaska.

Section 1315 of ANILCA, 16 U.S.C. § 3203(c) addresses management of existing cabins. That statute provides that "existing public use cabins within wilderness designated by the Act, may be permitted to continue and may be maintained or replaced subject to such restrictions as the Secretary deems necessary to preserve the wilderness character of the area." *Id.* Nothing in the regulation prohibits the use of public use cabins by commercial guides. The regulation provides that designated public use cabins may be used in conjunction with commercial guided services. Therefore, Alaska's argument that NPS exceeded its statutory authority in promulgating 36 C.F.R. § 13.17(e)(6)(iii) is incorrect.

D. NPS'S Renewed Motion For Summary Judgment.

NPS seeks summary judgment of the second cause of action filed in case number A89-183 by plaintiff Viggo Thor Brandt-Erichsen ("Brandt-Erichsen"). Brandt-Erichsen had filed suit on his own behalf challenging, in part, the regulations at issue in this case. By Judgment filed May 30, 1991 in *Viggo Thor Brandt-Erichsen v. United States Department of Justice*, No. A89-183 Civ. (D. Alaska), Judge Kleinfeld dismissed plaintiff's first and third claims in that action. It was further ordered that plaintiff's second claim be consolidated with this case, J87-012.

In his second cause of action in A89-183, which is now consolidated with this case, Brandt-Erichsen seeks in his individual capacity judicial review of the regulations

promulgated by NPS on September 19, 1986 found at 51 Fed. Reg. 33474, *codified at* 36 C.F.R. §§ 13.17, 13.21. Alaska, in a *parens patriae* capacity on behalf of the citizens of the State of Alaska, seeks judicial review in this case of the same regulations.

NPS filed a motion for summary judgment in A89-183, seeking dismissal of Brandt-Erichsen's second cause of action because that claim was already before the court in this action. NPS thus filed August 2, 1991 (Docket No. 53) a renewal of that motion for summary judgment.[12] Because Judge Kleinfeld severed that cause of action and consolidated it with this case, NPS's motion for summary judgment on the second cause of action is pending before the court, and is ready for decision.

Brandt-Erichsen opposes NPS's renewed motion for summary judgment, arguing that the consolidation eliminated any risk of an inconsistent result, and thus NPS's argument is no longer valid. An examination of Brandt-Erichsen's second cause of action, however, makes it clear that the claim is a challenge to NPS's regulations. It is the same challenge brought by Alaska. Therefore, Brandt-Erichsen's claim is identical to that brought by the state in a *parens patriae* capacity.

Because the court has determined above that Alaska has standing to challenge NPS's regulations in its *parens patriae* capacity, and because the court has disposed of Alaska's challenges to the regulations at issue in both

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[12] NPCA filed August 14, 1991 (Docket No. 54) a non-opposition to NPS's renewed motion for summary judgment on the Brandt-Erichsen claim.

Alaska's brief and Brandt-Erichsen's complaint, the second cause of action of Brandt-Erichsen must be dismissed. Brandt-Erichsen's second cause of action is an impermissible second suit on the same subject matter. Therefore, summary judgment for NPS is appropriate.

All claims for relief having been decided, the above case is dismissed in its entirety, with the exception as discussed in part III-C-5 above, which is remanded to the agency for regulation redraft.

IV. ORDER.

Accordingly, IT IS ORDERED:

(1) THAT the State of Alaska's challenge to regulations is DENIED;

(2) THAT NPCA's motion for summary judgment is GRANTED IN PART as outlined above in part III-C-5;

(3) THAT NPS regulation found at 36 C.F.R. 13.17 (e)(2)(iv) is declared invalid;

(4) THAT NPS is enjoined from enforcing said regulation;

(5) THAT said regulation is remanded to NPS for redraft; and

(6) THAT NPS's motion for summary judgment on the second cause of action in consolidated case number A89-183 Civ. is GRANTED.

DATED at Anchorage, Alaska, this 11th day of September, 1991.

James A. von der Heydt
United States District Judge

cc: Gary Amendola
Lauri Adams
Christine S. Schleuss
Dean Dunsmore
O & J V-28

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, Plaintiff-Appellant/ Cross-Appellee, v. UNITED STATES OF AMERICA; NATIONAL PARK SERVICE; MANUEL R. LUJAN, in his official capacity as Secretary of the Interior, Defendants-Appellees/Cross-Appellants, v. NATIONAL PARKS AND CONSERVATION ASSOCIATION, INC.; ALASKA CENTER FOR THE ENVIRONMENT; SIERRA CLUB, INC.; THE WILDERNESS SOCIETY, Plaintiff-Intervenor-Appellants/ Cross-Appellees.	)	Nos. 91-36297 91-36299 91-36303 D.C. No. CV-87-00012-JAV Filed: 02/25/93 ORDER

Appeal from the United States District Court for the *District of Alaska*

Before: HUG, POOLE, and FERGUSON, Circuit Judges.

The panel, as constituted in the above case, has voted to deny the petition for rehearing. Judges Hug and Poole have voted to reject the suggestion for rehearing en banc, and Judge Ferguson has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

Dated this ___ day of ___, 1993.

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Ninth Circuit Court Judge